

Government struggles to make case

WHERE IS THE EVIDENCE?

By Greg Griffin
Denver Post Staff Writer
The Denver Post

[Article Last Updated:03/31/2007 06:08:11 PM MDT](#)

Two weeks into the insider-trading case against Joe Nacchio, the government has not introduced strong evidence that the former Qwest chief executive willfully broke the law, experts say.

Without that, prospects for conviction may be weak.

That sets up a tall order for prosecutors as they enter the third and possibly final week of their case.

"They need words coming out of Nacchio's mouth (from a witness) that can show he wanted to sell because he knew there were problems at the company," said law professor and white-collar-crime expert Peter Henning of Wayne State University in Detroit. "They've got to have some testimony about what he was saying in order to show his motive to trade."

The prosecution's narrow case of criminal insider trading has also blocked introduction of key evidence. And time is running out.

"Bringing a case with simplicity for the jury is understandable, but so far it has not proven to be simple," said University of Denver law professor and securities expert Jay Brown, who is attending the trial as a consultant to The Denver Post. "What are you really gaining by cutting out things that are complicated, but are limiting in your ability to introduce evidence?"

During eight days of trial, the government has established that other Qwest executives told Nacchio they thought the company would miss its 2001 earnings targets.

But it has produced little to demonstrate Nacchio's frame of mind when he sold \$100.8 million in Qwest stock between January and May 2001.

That's required, either with direct or circumstantial evidence, to prove criminal insider trading. Nacchio faces 42 counts of that charge, each of which carries up to 10 years in prison.

Many observers had expected former Qwest chief financial officer Robin Szeliga to deliver at least some portion of that evidence on the stand. Her testimony, however, fell short of providing that kind of detail.

On Thursday, Nacchio attorney Herbert Stern appeared to make more headway than prosecutors in establishing Nacchio's state of mind regarding his stock sales.

During cross-examination by Stern, Nacchio financial adviser David Weinstein, a government witness, said he had urged Nacchio to sell more Qwest stock options in 2000 and 2001 to diversify his portfolio.

But Nacchio resisted, saying he wanted to wait for the stock price to rise, Weinstein said.

Former Qwest president Afshin Mohebbi took the stand after Weinstein and will resume his testimony Monday morning under questioning from lead prosecutor Cliff Stricklin.

No other Qwest executive worked more closely with Nacchio. Yet, in his grand-jury testimony, a portion of which was filed in the case, Mohebbi said, "I don't know what was in his mind."

Mohebbi said he told Nacchio more than once that he was uncomfortable with Qwest's earnings targets.

"I can't go that extra step to say what - how he linked what I gave him from what he said," Mohebbi told the grand jury. "But I can tell you what he told me, which is 'I heard you. I don't agree with it. ... We're not changing the numbers.'"

The difficulty establishing Nacchio's intent is just one hurdle facing the government. Its case suffered a series of setbacks last week, including several rulings by U.S. District Judge Edward Nottingham limiting their evidence.

On Tuesday, Nottingham barred prosecutors from mentioning Qwest's restatement of \$2.5 billion in revenue and earnings for the years 2000 through 2002.

The government tried to mention the restatement to counter defense attorney Stern's contention that the Denver-based phone company achieved its earnings targets in 2000 and for the first two quarters of 2001.

"I'm a little torn, because, frankly, I think that to say that Qwest made the numbers is a little bit misleading," Nottingham told attorneys during a bench conference, according to a transcript.

"But ... if we get into these accounting issues and how they were making the numbers and that kind of issue, we are going to be here a long time."

Stern then reminded the government that Assistant U.S. Attorney James Hearty told jurors in opening statements that the case isn't about accounting but about fairness.

Nottingham said the government could rebut Stern's comments regarding Qwest's making its numbers by reminding jurors that it did so only by relying on undisclosed sales of network capacity.

"That handicaps the government's case," said Wayne State's Henning. "The judge is being very careful about what he lets in that's outside the 2001 time frame."

A key government witness this week could be former Qwest board member Tom Stephens, who was chairman of the audit committee. He reportedly told Nacchio to tighten Qwest's financial practices and disclose more information to investors.

Stephens also identified problems in a swap of fiber-optic capacity between Qwest and Global Crossing. "This one stinks," he wrote in a note in April 2001 that became part of the public record during congressional hearings.

The strength of the government's case, so far, is the consistent testimony from former Qwest executives painting a picture of Nacchio's overaggressive financial targets in late 2000 and early 2001.

But the government has had difficulty introducing evidence related to a stock order it says Nacchio improperly backdated in late 2000.

It also was barred by Nottingham from bringing up its allegation that Nacchio transferred \$90 million into his wife's name in 2002, which prosecutors said showed he was trying to hide his illegal activity.

Nacchio's attorneys have had some success challenging the government's witnesses and eliciting testimony that may raise reasonable doubt among the jurors.

"It doesn't seem to me the prosecution has made its case yet," said Denver defense attorney Jeralyn Merritt, who has attended much of the trial. "The point of the whole trial is to show what his intent was in selling this stock."

Staff writer Tom McGhee contributed to this report.